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No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHNNY ALBERT AND MRS. JAMES E. NORRIS,
PETITIONERS,

v.

STATE OF LOUISIANA,
RESPONDENT.

Answer to petition for writ of Certiorari to the Supreme Court of the United States of America.

JACK P. F. GREMILLION,
Attorney General
of Louisiana;

KNOWLES M. TUCKER,
District Attorney,
16th Judicial District
of Louisiana.

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Answer to petition for writ of Certiorari to the Supreme Court of the United States of America.

To The Honorable, The Chief Justice of the Supreme Court of the United States, and the Honorables, The Associate Justices of the Supreme Court of the United States.

Respondent, the State of Louisiana, respectfully tenders the following in answer to the application filed herein on behalf of the petitioners.

SYLLABUS

I.

1. Movers did not request a trial by jury in the District Court nor was this question raised in the Louisiana Supreme Court. Under the law of Louisiana, this is not subject to review.

State v. Robinson (1886), 38 La. Ann. 968, 970.
State v. Barksdale (1898), 50 La. Ann. 55, 22, So. 966, 967.

State v. Dickinson (1938), 191 La. 266, 185, So. 20, 24.

The Sixth Amendment and the Fourteenth Amendment do not guarantee trial by jury in state courts for violations of state laws, nor was this issue raised either in the State District Court or the Supreme Court of Louisiana.

Palko v. State of Connecticut (1937), 302 U. S. 319, 324, 58 Sup. Ct. 149, 151, 89 L. Ed. 288.
Fay v. People of New York (1947), 332, U. S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043.

II.

1. The Fifth Amendment does not apply in trials in state courts. *Palko v. State of Connecticu* (1937), 302 U. S. 319, 324, 58 Sup. Ct. 149, 151, 89 L. Ed. 288.

The Fourteenth Amendment is not violated by Louisiana Constitution, Article 7, Section 10 in the instant cases. (See B of Appendix). See Louisiana Constitution, Article 1, Section 9 and Article 7, Section 42. See (A & C of Appendix). Petitioner's case was reviewed by the highest court in Louisiana and they have not yet been compelled to serve the sentence imposed because of a stay order granted by the Louisiana Supreme Court.

2. Appeal is not guaranteed by the Fourteenth Amendment.

Griffin v. People of the State of Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891.

Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469.

III.

1. Prosecution in the district courts of Louisiana may be by Information or Indictment (except in Capital cases which must be by indictment). Louisiana Constitution, Article 1, Section 9. (See A of Appendix).

2. The rule on amendments to indictments (informations) is set forth in Louisiana Revised Statutes Title 15:253. (See I of Appendix).

3. The amendment was allowed and a continuance granted to the accused strictly in accordance with the laws of the State of Louisiana. (See Transcript of Evidence, page 19). No new trial was asked for in this case which is a condition precedent for relief. Louisiana Revised Statutes Title 15:253. (See I of Appendix).

4. Petitioners suffered no injury by the amendment. None is complained of. None is shown. Petitioners offered no defense whatsoever, made no denial of the State's testimony and did not ask for additional delay to obtain evidence. The petitioners herein did not express surprise, as indeed they were not surprised by the change of dates as the Bill of Particulars furnished clearly shows that this offense was not the one of March 4, 1961. The defendant, Johnny Albert, was not tried for any offense occurring on March 4, 1961.

Louisiana Revised Statutes Title 15:253.

State v. Blankenship (1957), 231 La. 993, 93 So. (2d) 533.
State v. Johnson (1955), 228 La. 317, 82 So. (2d) 24.

IV.

In Louisiana, findings of fact by the Court (or jury) are not reviewable on appeal. Louisiana Constitution, Article 7, Section 10. (See B of Appendix).

State v. Bickham (1960), 239 La. 1094, 121 So. (2d) 207, 218. Certiorari denied. 364 U. S. 874, 81 S. Ct. 123 5 L. Ed. 98.
Constitution of Louisiana, 1921, Article 19, Section 9.
Louisiana Revised Statutes Article 15:384.

No greater relief may be obtained by certiorari than by appeal insofar as review of the facts in a criminal case are concerned.

State ex rel Johnson v. Thompson (1903), 111 La. 315, 35 So. 582.
State ex rel Green v. Porter, Judge (1901), 104 La. 538, 29 So. 273.
State v. Franques (1924), 156 La. 462, 100 So. 682, 683.

2. Only where there is no evidence on which a conviction can be based can a new trial be granted on this ground.

Badon v. U. S. (1959), 269 Fed. (2d) 75.
State v. Wall (1938), 189 La. 653, 180 So. 476.
State v. Martin (1939), 193 La. 1036, 192 So. 218.

State v. Bickham (1960), 239 La. 1094, 121 So. (2d) 207.

3. There is no motion for a new trial in this case. (See record).

State v. Kennedy, 95 So. (2d) 301, 232 La. 755.

4. The law of principals in Louisiana makes each party to a crime as guilty as the other, whether all are tried or not. Louisiana Revised Statutes Article 14:24. (See E of Appendix).

STATEMENT OF THE CASE

The act complained of as occurring March 4, 1961, was the subject of the trials before the Sixteenth Judicial District Court on April 25, 1961. The accused, Mr. and Mrs. James E. Norris, were found guilty in separate trials and sentenced to pay a fine of $50.00 and costs, etc. and to serve Fifteen (15) days in jail, and to serve Fifteen (15) additional days in default of payment of fine and costs. Applications for writs of certiorari were refused by the Louisiana Supreme Court on May 30, 1961. The sentences imposed have been served and this matter is ended.

Aside from this, the facts of those cases, as claimed by petitioners in this present application are incorrect which can be established by documentary evidence.

Mrs. Norris is serving One (1) year probationary sentence to the Louisiana State Penitentiary for is-

suing worthless checks in Eleven (11) cases to which she pled guilty on April 14, 1961.*

Mr. Norris is serving a two-year sentence in the Louisiana State Penitentiary on a conviction of theft for which he was tried and found guilty by a jury in the Parish of St. Mary on September 20, 1961.** He has been sentenced additionally to Two (2) years in the Louisiana State Penitentiary, on September 22, 1961, for theft in Iberia Parish on conviction by a jury. This case is on appeal.***

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*No. 9656—*State v. Mrs. James E. Norris*—$75 & costs & 10 days; suspended on condition she pays fine.

No. 9658—*State v. Mrs. James E. Norris*—1 yr. at hard labor in State Pen.; suspended on Good behavior one year.

No. 9657—*State v. Mrs. James E. Norris*—$75 & costs & 10 days; suspended on condition she pays costs.

No. 9659—*State v. Mrs. James E. Norris*—$25 & costs & 10 days; suspended payment of fine & jail upon payment of costs.

No. 9660—*State v. Mrs. James E. Norris*—$25 & costs & 10 days; suspended payment of fine & jail upon payment of costs.

No. 9661—*State v. Mrs. James E. Norris*—$75 & costs; sentence suspended on condition that she pay cost.

No. 9662—*State v. Mrs. James E. Norris*—$25 & costs & 10 days; suspended payment of fine & jail sentence upon payment of costs.

No. 9663—*State v. Mrs. James E. Norris*—$75 & costs & 10 days; sentence suspended on condition she pays costs.

No. 9712—*State v. Mrs. James E. Norris*—$75 & costs & 10 days; sentence suspended on condition she pays cost.

No. 9738—*State v. Mrs. James E. Norris*—$25 & costs & 10 days; suspended payment of fine & jail upon payment of costs.

No. 9739—*State v. Mrs. James E. Norris*—$25 & costs & 10 days; suspended payment of fine & jail sentence upon payment of costs.

**No. 15506—*State v. James E. Norris*, Parish of St. Mary, 16th Judicial District Court of Louisiana.

***No. 9749—*State v. James E. Norris*, Parish of Iberia, 16th Judicial District Court of Louisiana.

It is required by Louisiana Law that an officer making an arrest in the State of Louisiana remove all incriminating articles from the accused, Louisiana Revised Statutes Article 15:68. (See H of Appendix). The particular item sought in this case was a credit card that was later proven to have been used fraudulently by James E. Norris in the cases just above mentioned.

We do not know whether Norris had the credit card in his wallet when arrested, but the actions of these petitioners directly prevented the State from finding out. Clearly, therefore, they obstructed these officers as charged, and as found by the trial court. The officers could legally have used whatever force was necessary to carry out their arrest, Louisiana Revised Statutes Title 15:64. (See G of Appendix). However, they chose not to because these obstructions were by actions of these defendants who were not being arrested.

This completely negatives petitioners' claims of prosecutive harassment, whatever that phrase may mean.

Counsel may not complain that the hearing of his motions was set for May 15th. They were taken up and ruled on on that day. He made no move to examine the record for the Bills of Particulars before the trial and asked no one for them. He may not profit by his own laches. Counsel had associates, but none appeared. Counsel was able to reserve his objections to the court's rulings, which, incidentally, granted his request for

additional information. The court's ruling was in his favor.

The intent of the Grand Jury was and is of no interest here as the District Attorney has the undoubted right to amend either an indictment (even for a capital offense) or an information. Louisiana Revised Statutes Title 15:253. (See I of Appendix).

If the indictments were found to be fatally defective because of the date, the prosecutor could have immediately proceeded to file a new information alleging the new date. Louisiana Revised Statutes Title 15:253.

The amendment caused no injury or prejudice to petitioners for they were granted a continuance. They offered no evidence whatsoever. Obviously the amendment did not surprise them. If it be error, it is not reversible error unless the error be found prejudicial to some substantial right of the accused. Louisiana Revised Statutes Title 15:557. (See K of Appendix).

REASONS FOR NOT GRANTING WRITS

The only questions that should be considered on this application are: (1) Was any prejudicial error committed on the trial hereof that denied these petitioners any substantive right?

(2) Is the statute under which they were prosecuted constitutional?

(3) Were there any facts on which to base a verdict?

The petitioners did not request a jury trial in the district court. There is no ruling here to be reviewed

No question of the constitutionality of Louisiana Revised Statutes Title 14:108 was raised in the courts below, nor is it raised here. Again there is nothing to review. (See F of Appendix).

The ruling of the trial court on the motion for a directed verdict and the court's verdict shows that there was sufficient evidence to convince him beyond a reasonable doubt as defendants' offered none. By refusing the writs, the Louisiana Supreme Court approved of this ruling.

This court, we respectfully submit, will follow the interpretation of its own laws by a state's highest court.

It is, therefore, respectfully submitted that the rulings of the State District Court and Louisiana Supreme Court are correct and that no cause for the issuance of writs is shown herein.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General
of Louisiana.

KNOWLES M. TUCKER,
District Attorney,
16th Judicial District
of Louisiana.

CERTIFICATE OF SERVICE

Copy of the above and foregoing answer to petition for certiorari has been served upon Simon & Trice, Attorneys at Law, at their address 301 E. Congress Street, Lafayette, Louisiana, on the Hon. S. O. Landry, Judge, New Iberia, Louisiana, and Hon. Val J. Courville, Clerk, Louisiana Supreme Court, New Orleans, by mail, postage affixed and prepaid on the____day of_____, 1961.

APPENDIX

(A) *Constitution of Louisiana, Article 1, Section 9:* In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury or by a jury less than twelve in number, as provided elsewhere in this Constitution; provided further, that all trials shall take place in the parish in which the offense was committed, unless the venue be changed; provided further, that the Legislature may provide for the venue and prosecution of offenses committed within one hundred feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the militia when in actual service in time of war or public danger; nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained.

(B) *Constitution of Louisiana, Article 7, Section 10:* The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows:

APPELLATE JURISDICTION; CRIMINAL. The appellate jurisdiction of the Supreme Court shall also extend to criminal cases on question of law alone, whenever the penalty of death, or imprisonment at hard labor may be imposed; or where a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed.

(C) *Louisiana Constitution, Article 7, Section 42:* GRAND JURY; DISTRICT JUDGES; AUTHORITY IN CRIMINAL CASES. A grand jury of twelve, nine of whom shall constitute a quorum and must concur to find an indictment, shall be empanelled in each parish twice in each year, and shall remain in office until a succeeding grand jury shall have been empanelled, except in the Parish of Cameron, in which at least one grand jury shall be empanelled each year.

The district judges shall have authority to try at any time misdemeanors, and, when the jury is waived by the defendant, all cases not capital or necessarily punishable at hard labor, and to receive pleas of guilty in all cases less than capital.

(D) *Louisiana Constitution, Article 19, Section 9:* LIBEL; JURY AS JUDGES OF LAW AND FACTS IN CRIMINAL CASES. In all proceedings or indict-

ments for libel, the truth thereof may be given in evidence. The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilty or innocence, having been charged as to the law applicable to the case by the presiding judge.

(E) *Louisiana Revised Statutes Title 14:24:* PRINCIPALS. All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

(F) *Louisiana Revised Statutes Title 14:108:* RESISTING AN OFFICER. Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification and connotation mean:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance *or opposition to the arresting officer after the arrested*

party is actually placed under arrest and before he is incarcerated in jail.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

Whoever commits the crime of resisting an officer shall be fined not more than three hundred dollars, or imprisoned for not more than six months, or both.

(G) *Louisiana Revised Statutes Title 15:64:* SUBMISSION TO ARREST; USE OF FORCE TO OVERCOME RESISTANCE. Every one must submit peaceably to a lawful arrest, and, if he resists, any person lawfully arresting him may use such force as may be necessary to overcome the resistance.

(H) *Louisiana Revised Statutes Title 15:68:* DELIVERY TO SHERIFF OF ARTICLES TAKEN FROM PRISONER; RETURN TO RIGHTFUL OWNER. Any person making an arrest shall take from the person arrested, all offensive weapons or incriminating articles which he may have about his person and must deliver them to the Sheriff of the parish, chief of police of the city, or to the magistrate before whom he is taken; provided, that any officer removing from a person accused or arrested anything of value, shall be responsible for the same; and unless it be property which such officer is required to destroy or which he has the legal right to destroy or keep, the same shall be returned to the person to whom it rightfully belongs.

(I) *Louisiana Revised Statutes Title 15:253:*

AMENDMENT OF INDICTMENT; EFFECT OF OBJECTION BEFORE TRIAL; DISCHARGE OF JURY; CONTINUANCE; POSTPONEMENT. No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been inpanelled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceedings with the trial or by a postponement thereof to a later date with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or

postponement under this article shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

(J) *Louisiana Revised Statutes Title 15:384:* PROVINCE OF JUDGE AND JURY; WEIGHT OF EVIDENCE; JUDGE'S INSTRUCTIONS. It belongs to the jury alone to determine the weight and credibility of the evidence, but the judge shall have the right to instruct the jury on the law but not upon the facts of the case. The judge shall not state or recapitulate the evidence, repeat the testimony of any witness, nor give any opinion as to what facts have been proved or refuted.

(K) *Louisiana Revised Statutes Title 15:557:* MATTERS NOT GROUNDS FOR REVERSAL; EXCEPTION. No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the rights of the accused, or constitutes